



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

Indicators as a Technology of Global Governance

Workshop Report

This document summarizes the discussions at a workshop held on December 4, 2008 at New York University School of Law. The workshop is part of a larger study on the use of indicators as a technique of global governance, undertaken by the Institute for International Law and Justice.

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Overview

The workshop was convened for the purpose of launching the project of the Institute for International Law and Justice entitled, “Indicators as a Technology of Governance,” and to seek input on the structure and substance of the project from the academic community and experts engaged in the construction and/or evaluation of indicators.

The workshop began with an introduction of the IILJ project and its research agenda by Professors Benedict Kingsbury, Kevin Davis and Sally Merry. The introduction was followed by a discussion concerning the definitional elements of indicators. Subsequently, Professors Bina Agarwal, Simon Deakin, Sakiko Fukuda-Parr, Susan Randolph and Meg Satterthwaite discussed their respective work related to the production and evaluation of indicators. This summary report draws on the discussions and papers presented during the workshop.

PART I. IILJ Project: Indicators as a Technology of Governance

(i) IILJ Research Agenda

The use of indicators as a technology of global governance appears to be becoming increasingly widespread. Users of indicators include public international development agencies such as the World Bank and the United Nations, national governmental aid agencies, such as the U.S. Millennium Challenge Corporation, global businesses and investors, bodies concerned with assessing or enforcing compliance with existing legal standards such as human rights treaty supervisory bodies, advocacy groups, and various scientific and other expert communities. While the production and use of indicators has been subject to a remarkable expansion, this practice has not been accompanied by a systematic comparative study of and reflection on, the implications, possibilities and its pitfalls. The development of statistical measures of populations and indicators to render the data readily accessible has helped change the way societies are understood. The general lineaments of the history of data collection and analysis are now reasonably established, but the specific history of indicators has yet to be written.

Relatedly, while work is being done to make indicators better (more accurate, informative, useful etc), it is equally important to examine how indicators are being used to describe and prescribe evolving social orders. Indicators are a form of knowledge production with substantial implication for power. They are used, among other things, to construct ideas of how people behave in the world and to measure compliance against those ideas. Indicators are also used to exert economic authority, such as when they are used by development agencies to allocate aid (e.g., MCC). Given the power dynamics at play and at stake, the following questions become highly relevant: *Who is deciding what to measure and turn into an indicator? Who is designing indicators? How and where is the data being collected? Who is using indicators? What are the implications of*

conceiving of and producing alternative indicators? Each of these questions requires deeper examination.

One strand of the IILJ's project will investigate how the production and use of indicators has changed over time and across different configurations of political structures, bodies of expertise, and economic and legal environments. Within this broad setting, the project will seek to map the technical and socio-political development of this technology in recent decades, understand its current trajectory, its relation to other phenomena, and possible future trends. In addition, adopting the perspectives of global governance, law, economics, politics, and anthropology, the IILJ project intends to address the following fundamental questions, which include: *What does it mean to use indicators as a technology of governance? How does the increasing use of indicators in global governance affect the distribution of power, and how does it affect the distribution of power among the governed? How does it affect the nature of decision-making about the allocation of resources and efforts to monitor compliance with global standards?* Specifically, the IILJ project uses case studies to focus on indicators relevant to law and legal institutions involved with international development, human rights, and water access.

This project is inextricably connected to the IILJ's Global Administrative Law (GAL) project, which studies the increasing use of administrative law-type mechanisms in global governance, in particular those related to transparency, participation, accountability and review. The GAL project has resulted in over one hundred papers, encompassing work in both developed and developing countries.

(ii) The Question of Definition

The definition adapted by the IILJ project delimits an indicator in the following way:

“An indicator is named representation by ordinal data that simplifies a more complex social phenomenon, typically invoking specialist expertise and claiming to use social scientific methodology. The representation is capable of being used to compare different units of analysis (such as countries), and to evaluate their performance by reference to one or more standards.”

This definition subsumes indexes and other composites, which aggregate different indicators. Several elements of the definition are worth emphasizing in order to provide further specification of the impetus for, and scope of, the IILJ project.

- (i) *Ordinal*: an indicator need not rank all data points or all units in a transitive way. It need not be cardinal, attributing separately defined values to each unit, nor need it use equal-interval or ratio scales. However, some element of ordinal ranking is a necessary feature of the indicators subject of the IILJ study.
- (ii) *Simplification*: The quest for “objective” assessment can be traced to (i) state administration, (ii) reform initiatives, (iii) social science research, and (iv)

business administration (economic measures). Indicators are seen as a production of apparently objective knowledge that allows comparison through a process of simplification. Simplification is a feature of the attraction (and probably the impact) of indicators. Studying the impact of indicators thus involves the study of cognitive processes in opinion- and policy-formation among various actors and institutions upon which an impact is discernible: that is, when and why does simplification have an impact on decisions or opinions? Using a single scale invites the idea that policy prescriptions or normative evaluations are transferable between the different units, but the effects of simplification run much deeper. Simplification may make the data more homogeneous by obscuring the context. Qualifications carefully introduced by the technical producers of indicators are routinely shorn off by users, and complexities within indexes or from missing data may be ignored or smoothed over. Conversely, policies based on use of indicators may potentially be more complex than the simplified indicators in fact support.

- (iii) *Expertise*: indicators are typically tied to roles of experts and expertise in the substantive policy area involved and/or the statistical compilation and analysis. The exact alignment between the expertise and the indicator production may, however, be affected by intermediaries in the production process and post-production dissemination and interpretation. Here, questions are also raised regarding who is included and excluded from the production of indicators?
- (iv) *Social-scientific methodology*: this raises the questions of what measure to use? – e.g., if we want to ascertain instances of domestic violence, do we look at the number of restraining orders or is it more accurate to conduct a survey asking about people’s experience with domestic violence? How does one measure law, for example? What methodology is chosen has enormous implications for the data that is produced and subsequently used for policy decisions.
- (v) *Inter-unit Comparability*: indicators enable comparisons among similar units of analysis. They make claims to objectivity, comparability, and scientific knowledge. However, labeling an indicator as representing a particular concept, such as the rule of law, corruption, or trafficking, is an interpretive process by which the numerical value acquires social meaning. Indicators are, by definition, shorthand representations of other, more complex realities. They inevitably eliminate context, history, and variability. They are often based on flawed or missing data and provide skewed or partial knowledge.

The discussion that followed the introduction of the IILJ Project, its research agenda and the break down of the definitional elements highlighted the need for a further delineation of what an indicator is. Professor Kornhauser pointed out that there are at least three types of indicators. One is a census, where the thing to be “counted” is clearly defined but the counting methodology is complex.¹ Another is, for example, a measure of

¹ A census could be contrasted with a measurement of violence against women. With the latter, there is an issue of *what* counts as “violence against women” and *how* to measure it. In contrast, a census of people in

equality and inequality. Unlike the census, such a measure is an inherently relational concept that is contested, and different measurements offer different conceptions of what it means for things to be equal or unequal. The third type is a price index. Here, the index represents a simplified description or tracking of the movement of a complex variable (i.e., price levels). Should all three be considered “indicators”?

Other participants suggested that whether something is an indicator depends on its function. For example, a census is one way of collecting data that could then be used to inform the development or updating of certain indicators. In other words, perhaps the category of indicators should be limited to that simplified data which serves to measure and achieve certain normative outcomes sought to be attained by a set of stakeholders (government, international organizations, public interest entities as well as private or hybrid actors). Another related possibility is to define an indicator by who uses it: namely, a person or entity whose (indicator-based) decisions have an impact on the broader public.

The question of what is considered an indicator was not resolved and the discussion pointed to the need for a more in-depth analysis of the definitional elements.

PART II: Ongoing Work on Indicator Production and Evaluation

- (i) *Professor Bina Agarwal’s work on the Commission for the Measurement of Economic Performance and Social Progress.*

The Commission was set up by President Sarkozy in recognition of the vast gap between people’s perceptions of well-being and standard measures of economic performance and social progress, and especially of the limits of GDP as an indicator of well-being. The aims of the Commission are to identify needed adjustments to GDP as an indicator, to consider additional relevant indicators, and to assess the feasibility of alternative measurements tools. Professor Agarwal focuses in particular on the measurement of political voice and citizens’ voice. Instrumentally, citizen’s voices can provide an essential corrective to public policy, ensure accountability of governments and public institutions, reveal what people need and value, call attention to significant human deprivations, highlight significant human achievements, reduce the potential for social conflict, and enhance prospects for building social consensus on key issues, among others. The operationalization of constitutional guarantees of citizen participation can contribute directly to well-being.

How can one measure where a country stands in terms of political voice, legal guarantees and the rule of law? Professor Agarwal argues that the indicators can be both objective and subjective. Objective indicators (usually obtained based on the opinion of experts) include measurements such as the existence of multiparty democracy, universal suffrage, free, fair and regular elections, constitutional guarantees, existence of independent

the U.S. does not raise questions of who is a “person”. Instead, the difficulty lies in *how* counting takes place.

judiciary, etc. Subjective indicators would be citizens' perceptions concerning the "objective" measurements. Sources for the indicators (usually a mix of objective and subjective indicators) are provided by a number of non-profit organizations. Gaps in data exist, however. Such gaps include the absence of disaggregated information on inequalities predicated on race, gender and minority status in access to legal redress, and race, gender and minority/majority differences in perceptions about the ways in which political, legal and executive institutions function.

Professor Davis suggested that it might be interesting to think about the impact of authoritative commissions on stimulating the collection of data for indicator production. A related discussion concerned the labeling of indicators as "objective" versus "subjective." It was suggested that a better approach would be to make a distinction between "internal" and "external" indicators – where "internal" indicators capture citizens' perceptions while "external" indicators are those obtained from a source other than the citizen himself (or herself). Professor Agarwal herself acknowledged that, by using experts, one is in fact using subjective perceptions of the so-called objective indicators.

Another participant noted that "expert"-generated indicators are most effective when they are arrived at based on consensus rather than on a (presumed) notion of objectivity. Professor Randolph also noted that the discordance between the so-called objective measure and subjective perception is influenced by the choice of the objective measure. For example, if citizens are asked about participation, they may answer the question on the basis of participation in issues that are important to them (e.g., school curriculum). However, if voting is used as the objective indicator of participation then there will be a wide discordance between objective and subjective indicators because voting is not a relevant measurement of participation in e.g., choosing a school curriculum.

(ii) *A Study by Professor Simon Deakin: The Legal Origin Hypothesis: What We are Learning from Time-Series Evidence.*

Professor Deakin and his colleagues conducted a study testing the 'law matters' and 'legal origin' claims using a dataset that measured legal change over time in a sample of developed and developing countries. The focus of their study is on shareholder and creditor protection as well as on labor and insolvency law. Their analysis shows that legal origin explains part of the pattern of change in the adoption of shareholder protection measures over the period from the mid-1990s to the present day: in both developed and developing countries, common law systems were more protective of shareholder interests than civil law ones. They reason that the result is due to the head start common law systems had in adjusting to an emerging "global" standard based mainly on Anglo-American practice. The study further investigates whether there was a link between increased shareholder protection and stock market development, using a number of measures such as stock market capitalization, the value of stock-trading and the number of listed firms, after controlling for legal origin, the state of economic development of particular countries, and their position on the World Bank rule of law index. The authors found no evidence of a long-term impact of legal change on stock

market development. With respect to labor law, the study found that labor regulation was positively related to productivity growth in civil law because of their civil law origins.

Workshop participants asked about the relationship between Professor Deakin's study and the World Bank's work on measuring a set of variables across countries, such as how many days it takes to get a judgment. Professor Deakin replied that the underlying data used by the World Bank is not satisfactory because it relies on questionnaires sent to law firms, raising concerns of representativeness. Professor Agarwal asked about the underlying story between the common law and civil law jurisdictions and also about the case of hybrid systems. Professor Deakin replied that legal institutions had evolved over time in a way that reflects local conditions. He further explained that the comparison between common and civil law is really a comparison between controlled versus liberal markets and that transplants from one to the other often work in unexpected ways. He concluded that the authors of the study do not think there is a convergence on a single model.

Professor Stewart inquired whether the study's measurements can be considered indicators. Professor Deakin replied in the affirmative, noting that the measurements represent attempts to capture numerically the essence of legal rules.

- (iii) Sakiko Fukuda-Parr, Susan Randolph and Terra Lawson-Remer: *Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment*.

Professor Fukuda-Parr and her colleagues propose a methodology for designing an index of economic and social rights fulfillment that (1) uses available survey-based objective, rather than subjective data, (2) focuses on state obligations rather than solely on individual enjoyment of rights, and (3) captures the progressive realization of human rights subject to maximum available resources. The proposed index ranks countries by measuring the relationship between the extent to which a population enjoys fundamental economic and social rights, and the resource capacity of the state fulfill its obligations. The index does not assess the extent to which economic and social rights obligations are being fulfilled; instead, it focuses on whether a state is doing better or worse than other states facing similar resource constraints.

The goal for and impetus behind the index was to allow actors in the global south to monitor fulfillment of human rights. In the conception of the index, the authors aimed to create a transparent and replicable methodology that focuses not only on the enjoyment of a right by an individual but also on the accountability of the duty bearer. Two methodologies are proposed: the Ratio approach, and (2) the Achievement Possibilities Frontier approach. The Ratio approach measures fulfillment of economic and social rights as a ratio between the extent of rights enjoyment and state resource capacity. The numerator, the extent of economic and social rights enjoyment, is assessed by looking at socio-economic indicators that measure economic and social rights results (e.g., primary school completion rates, malnutrition rates, etc.). For the denominator, the natural log of GDP per capita is used as a proxy for resource capacity. The Achievement scores on

each indicator are constructed by setting the maximums and minimums for each indicator, and then determining where a given country falls. For example, the achievement score for “under 5 survival rate” is constructed by dividing the difference between the survival rate for a given country and the lowest survival rate since 1990 for all countries by the difference between the maximum (100%) and the minimum survival rate observed in any country since 1990.

Participants at the workshop noted that by reducing the concept of “progressive realization” to a ratio, the authors risk flattening out the substance that lawyers and advocates have attempted to give to the concept over the years. Professor Davis also noted that using GDP as a proxy for state capacity may conceal issues of government reach, geography and other structural elements.

- (iv) Meg Satterthwaite, *The Trust in Indicators: Measuring Human Rights* (paper co-written with AnnJanette Rosga)

Professor Satterthwaite presented her paper, which examines compliance indicators in a human rights context. Specifically, she focuses on the effort by the UN Office of the High Commissioner for Human Rights to create an index of human rights compliance – a process that involves breaking down rights into quantifiable data. Professor Satterthwaite highlighted two specific issues that the paper addresses: function of judgment and democratic accountability. With respect to the former, the paper questions what happens to the function of judgment in this setting. Treaty bodies are empowered to assess compliance but their authority to do so (as well as their authority to strictly define the content of a right) is hotly contested. Yet, what the index does is turn the exercise of treaty bodies’ judgment into one of technical measurement. Professor Satterthwaite also noted that indicators threaten democratic accountability by measuring the outcomes of certain policies or even turning specific policy choices themselves into indicators. For example, “coverage of targeted population covered under public programs on nutrition education and awareness” has been identified by the O.H.C.H.R. as an indicator for the right to food. While such programs are one way to achieve an important element of the right to food, they might not be the one preferred by the citizens of a specific State, who may want funds to be spent on direct food aid, or supplements to farmers who cultivate staple foods.

In her paper, Professor Satterthwaite recommends that the treaty bodies select, in consultation with the O.H.C.H.R. and NGOs, a set of outcome indicators that can accurately measure the enjoyment of rights set out in the various treaties, disaggregated appropriately and adjusted over time and context. Then, rather than tasking the U.N.H.C.R. or the treaty bodies with determining which structural and process indicators should be used to achieve these outcomes, this responsibility would devolve to states, which would use the illustrative indicators as a guide, to be supplemented as needed.

Professor Satterthwaite also noted that it is important to examine the way NGOs and advocacy groups develop, market and use indicators as advocacy tools. She briefly introduced her new project, which examines the right to water in Haiti and aims to

investigate whether indicators used at the local level are perceived as useful advocacy tools at a time when water utilities are being privatized in that country. The project will also assess whether indicators are a powerful advocacy tool generally and whether they can be democratically created.